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SUPREME COURT OF THE UNITED STATES

No. 1100

THE CORTEZ COMPANY,
Petitioner,

vs.

COUNTY OF MANATEE, et al.,
Respondent.

Petition for Denial of Writ of Certiorari

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondent, COUNTY OF MANATEE, [redacted], respectfully prays this Court to deny the Petition of the Petitioner for writ of certiorari.

Reports of the Opinions Delivered by Lower Courts

1. Opinion of the Supreme Court of Florida affirming order of Circuit Court dismissing the Petitioner's complaint, was announced January 17, 1964. Mandate issued February 13, 1964, a copy of said opinion appears in the appendix hereto.

2. Order of the Supreme Court of Florida denying Petition for Rehearing was filed February 13, 1964. A copy of said order appears in the appendix hereto.

Basis of Jurisdiction

Petitioner seeks to have reviewed in his Petition for Certiorari that order entered by the Supreme Court of the State of Florida, in the above entitled cause, dated January 17, 1964, which became final upon a denial of Petitioner's petition for rehearing dated February 13, 1964, and the issuance of the mandate of said court on that date.

The jurisdiction of this court was invoked by the Petitioner under the provisions of the following Statute of the United States: FCA, Title 28, Section 1257(3)

Section 1257(3) supra:

> Final judgments of decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows . . . (3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of

the United States or where any title, right, privilege or immunity, is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Questions Presented for Review

1. Is Section 253.122 of the 1957 Florida Statutes void and unconstitutional in that it impairs the obligations of a contract contrary to Article 1, Section 10 of the Constitution of the United States?

2. Is the decision fixing such a bulkhead line void and unconstitutional in that it impairs the obligation of a contract contrary to Article 1, Section 10 of the Constitution of the United States?

3. Is the decision fixing such a bulkhead void and unconstitutional in that it is a taking of the private property outside the bulkhead line, without just compensation contrary to Amendment XIV of the Constitution of the United States?

Constitutional Provisions and Florida Statutes Involved

1. United States Constitution, Article 1, Section 10, Clause 1-FCA, Constitution, page 205.

2. United States Constitution, Amendment 14, -FCA, Amendments, Page 65.

3. Section 253.122, Florida Statutes, 1957.

4. Section 253.15, Florida Statutes, 1955.

5. Section 253.12, Florida Statutes, 1957.

Summary Statement of the Case

The Respondent adopts the Petitioner's statement of the case and further states that all the procedural steps required by Section 253.122 of the Florida Statutes relating to the fixing of a bulkhead line were followed and that this was not an issue in the lower courts.

Reasons for the Denial of the Petition for Writ of Certiorari

Respondent contends that the setting of a bulkhead line through part of the Petitioner's property was done under Section 253.122 of the 1957 Florida Statute. This section was passed by virtue of the State's police power and therefore the action taken under it by the Board of County Commissioners did not violate Article 1, Section 10 of the United States Constitution.

The Petitioner claims that valid laws subsisting at the time and place of making a contract became a part of this contract. At the time when the executory contract was entered into on October 6, 1955, the State at that time had not yet exercised its police power by establishing a bulkhead line. There is no contention here that the establishment itself of such a bulkhead line is outside the police powers of the State. It has been clearly decided that such matters as zoning, building, etc., are within the police powers of the State. The contracting parties are subject to future exercise of this police power, although at the time the contract is made the State has not yet exercised such power. This principle was stated in Kindelberger v. Lincoln National Bank of Washington, 155 F 2nd 280, in these words:

> "Moreover, persons who contract concerning matters which may be regulated by virtue of the police power of government necessarily enter into their engagements subject to the possible exercise of that power, it may be latent at the time the agreement is made."

Although by Section 253.15 of the Florida Statutes of 1955, the purchaser of submerged lands had the right to bulkhead and fill, this did not become a constitutional right of the Petitioner. In Thornton v. Duffey 254 U.S. 361, 65 L. Ed. 304, 41 S. Ct. 137, the Court stated:

> "To assert that the first steps of a policy made it immuntable is to assert that imperfections and errors in Legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new, and we have heretofore been invoked to pronounce judgment upon it. Complying we said that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it, upon the ground that its later exercises deprive of property or invalidate those contracts."

The Petitioner here received from the Trustees of the Internal Improvement Fund a fee simple title to the property in question. There is no claim of a grant of immunity to the corporation from the State from legitimate governmental control. Such a grant must be clearly shown and will never be presumed. In the case of Chicago & Alton R.R. Co. v. Tranbarger 238 U.S. 67, 59 L. Ed. 1204, 35 S. Ct. 678 The Court stated the following:

> "Grants of immunity to a corporation from legitimate governmental controls are never to be presumed. On the contrary, the presumptions are

> all the other way; and unless an exemption is clearly established, the Legislature is free to act upon all subjects within its general jurisdiction as the public interests may seem to require."

The Court went on to state that:

> "The regulation to which a corporation is subject include not only such as conduce to the public health, safety and morals, but also such as promote the public convenience or general prosperity."

The case of Wood v. Lovette cited in Petitioner's brief was such a case where the State granted specific and clear immunities to those who purchased tax titles from the State. Therefore, this case has no application to the case in question.

The control over the navigable waters of the State is an essential attribute of the State's sovereign power. When the parties entered into their executory contracts on October 6, 1955, this attribute of sovereignty was part of this contract. The State at no time gave up under its police power the right to regulate the property in question for the health, safety, morals and welfare. Even though under the law, as existed in 1955, the Petitioner obtained the right to fill this submerged land there remained in the State or its sub-divisions a right to regulate this property for the public welfare. In the case of Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 78 L. Ed. 413, 54 S. Ct. 231, the Court stated:

> "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting

> contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile, a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of State power has had progressive recognition in the decisions of this Court."

It is a well established fact that a ragged, indented shoreline creates pockets in which the water tends to stagnate, breeding disease and accumulating filth, as these pockets are so situated that they are not susceptible of being flushed by the action of the tides and currents. It is therefore essential that the State government regulate the shoreline to preserve the community from injury. In the case of New York & New England R.R. Co. v. Town of Bristol, 151 U.S. 556, 38 L. Ed. 269, it was stated:

> "It is likewise thoroughly established in this Court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by a legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to government regulations in particulars essential to the preservation of the community from injury."

The fact that part of Petitioner's lands have been rendered less useful by the setting of such a bulkhead line does not render such action unconstitutional. The

Board of County Commissioners, a political subdivision of the State, did not appropriate this land for its own use. Their action was purely one of regulation under the police powers for the public welfare. In the case of Northwestern Laundry v. Des Moines 239 U.S. 486, 36 S. Ct. 206, 60 U.S. (L. Ed.) 396, the Court ruled on such a case where this type of legislation acted harshly upon one of the parties. The Court stated in these words:

> "So far as the Federal Constitution is concerned, we have no doubt the State may by itself, or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require a discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance."

The fact that the contract was between the Petitioner and the State of Florida, does not put the Petitioner in a special position. Such contracts with the State are treated the same as contracts between individuals. In the case of New Orleans Gas Light Company v. Louisiana Light, etc. Mfg. Co., 29 L. Ed. 516, 115 U.S. 671, 6 Sup. Ct. Rep. 263, The Court stated:

> "The constitution prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, as the one or the other may be invalid in the execution of such contracts. Rights and privileges arising in contracts with a State are subject to regulations for the protection of the public

> health, the public morals and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporation."

The Petitioner claims that no condemnation proceedings have been begun, and that no public necessity for the use of his property has been alleged. Petitioner also claims that Respondent's action is a taking of the property even though actual ownership of the property has not been transferred to the Respondent. Such a contention was brought up in the case of Knox v. Lee, 20 L. Ed. 287, 79 U.S. 379 where the Court dealt with this in the following words:

> "Closely allied to the objection we have just been considering, is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the Fifth Amendment which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, *and not to consequential injuries* resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to limit laws that indirectly work harm and loss to individuals."

In the present case there has been no appropriation of Petitioner's property and the sole action has been one under its police powers. The result has been that the Petitioner is prohibited from using parts of his property for the safety of the public. The Case of Sweet v. Rechel, 159 U.S. 380, 40 L. Ed. 188, 16 St. Ct. 43 stated that:

> "Undoubtedly, the State, without taking the title to itself, may, in some appropriate mode, and with-

> out compensation to the owner forbid the use of specified private property where such use would be injurious to the public health. For, as said by Chief Justice Shaw in Com. v. Alger, 7 Cush. 53, 84, 'it is a settled principle growing out of the nature of well ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having, an equal right to the enjoyment of their property, nor injurious to the rights of the community.' . . ."

The Petitioner in his brief cites the cases of Appleby v. New York, 271 U.S. 365, 70 L. Ed. 92, and contends that this case decided the very question being presented in his brief. The Respondent contends that the facts in our present case are so unlike those of the Appleby case, that the Appleby decision is in no way applicable to the present case. In the Appleby case the City conveyed a fee simple title to the land and in addition covenanted that Appleby and his heirs and assigns should receive all manner of wharfage, cranage, advantages or emoluments growing or accruing by or from the west side of the granted premises. In this same Deed Appleby covenanted with the City that within three months after the City required it he would build four bulkheads and wharves and fill in and pave such parts of 12th and 13th Avenue and 39th and 40th Streets, as lay within the described premises.

Therefore, in the Appleby case the City gave up clearly and specifically any rights to control or use the described property. This is not so in our case where the State of Florida simply granted a fee simple title to the Petitioner, without giving up in any way its future

rights to regulate the property under the police power for the general welfare.

In the Appleby case the law of 1871 authorized the Department of Docks to set forth a plan for the complete development of the waterfront and gave the Department the right to acquire by purchase or by condemnation any wharf property not belonging to the City. Under this a condemnation proceeding was begun by the City against Appleby to appropriate part of his land and during the pendency of this proceeding the City constructed concrete and steel piers against Plaintiff's objection within his property. The Petition was not to nullify the bulkhead line but to enjoin the City and its tenants and the other Defendants from using Plaintiff's lots as a slip or permanent mooring place and from dredging them.

Regarding the question of the contract between the City and Appleby, the Supreme Court stated that this was a State question and that it must be determined from the law of the State as it was when the Deeds were executed. In discussing these State decisions, the Supreme Court stated in the following words:

> "It is apparent from these decisions that under the law of New York, when these cases were decided, whenever the Legislation deemed it to be in the public interest to grant a deed in fee simple to land under tidal waters and exclude itself of its exercise as sovereign of the jus publicum, that is the power to preserve and regulate navigation, it might do so; but that the conclusion that it had thus excluded the jus publicum could only be reached upon clear evidence of its intention and of the public interest in promotion of which it acted."

The Court went on to discuss the decision of Langdon v. New York 93 N.Y. 129, and stated the effect of the Langdon decision in these words:

> "The necessary effect of the Langdon case, which has always been a leading authority in the State of New York, is that a grant upon a valuable consideration of the easement of wharfage related to land under water conveyed by the City by authority of the State, for the purpose of promoting commerce in the harbor of the City, takes away from the City and State the power to regulate navigation in any way which would interfere with or obstruct the grant, and that if the City desired in the interest of navigation to obstruct such easement it must acquire it by condemnation."

Therefore, the Court in the Appleby case, because the City had specifically and clearly granted away any rights to the land in question ruled that the laws passed by the State did impair the contract made by the City with the grantees of these deeds. The deed in question in the Appleby case was not one which granted the land in fee simple only but contained various covenants.

The City in the Appleby case did not only attempt to regulate the Plaintiff's property, but appropriated this property for its own use and for its own profit. This is the very type of appropriation which the United States Supreme Court has so often mentioned in previous decisions. This does not exist in the case at hand since the State has not attempted to make any use of Petitioner's property but only to regulate the property for the public health and welfare. The Court in Appleby case stated:

> "Of course we do not intend to say that under such deeds as these, as long as water connected

> with the river remains over the land conveyed and to be filled, navigation may not go on and boats may not ply over it and that incident to such use occasional mooring may not take place. But it is a very different thing to say that the City which has parted with the jus publicum and jus privatum over such water lots remains in unrestricted control of navigation with the right to dredge them or appropriate the water over them as a slip or regular mooring place for its adjoining piers in the doing of a great business largely excluding Plaintiff's and all others from use of the water over those lots for the constant private use of the City's tenants for its profit."

The Court decided only what rights the plaintiff had under its particular deeds and ruled only that by the deeds involved the City had extinguished its use publicum. It did not decide the question as to whether or not the State could regulate the use of an individual's property under its police power for the public welfare.

If the bulkhead line were not upheld in this case it would prevent the State and its subdivisions from regulating under its police powers for the public welfare all lands having been conveyed by the Trustees of the Internal Improvement Fund.

Prayer for Denial of Writ of Certiorari

WHEREFORE, your respondent prays that this Honorable Court deny Petitioner's Petition for a writ of certiorari in that there has been no showing in his brief that there exists any violation of the United States Constitution.

Respectfully submitted

By Kenneth W. Cleary

Kenneth W. Cleary, *Counsel for Respondent*

APPENDIX

1. Opinion of the Supreme Court of Florida, affirming order of Circuit Court dismissing Petitioner's complaint.

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1964.

THE CORTEZ COMPANY,
Appellant,

vs. CASE NUMBER 32,655

COUNTY OF MANATEE, et al.,
Appellees.

Opinion filed January 17, 1964.

An Appeal from the Circuit Court for Manatee County, Robert E. Willis, Judge

Robert E. Knowles of Knowles, Knowles and Mann,
for Appellant

James W. Kynes, Attorney General,
Robert C. Parker and James T. Carlisle,
Assistant Attorneys General for Appellees

ROBERTS, J.

This appeal is from an order dismissing an original complaint for declaratory and other relief consequent upon a proceeding by which a bulkhead line was set

pursuant to Section 253.122, F.S., across submerged lands purchased by appellant from the appellee trustees of the Internal Improvement Fund under contract of October 6, 1955.

We find that the controverted order must be affirmed upon authority of *Gies v. Fischer*, Fla. 1962, 146 So. 2d 361. That decision disposed of the *constitutional issues* contrary to appellant's contentions, construing the provision of the statute that such a line "shall represent the line beyond which a further extension . . . shall be deemed an interference with the (public) servitude" as vesting a discretion based on factual determinations, and not arbitrary or capricious in nature.

The power vested in the authorities named in the statutes to fix and determine these lines, must be exercised in the interest of the general welfare and not for the purpose of granting advantage to or imposing penalties upon individual upland owners or others. Nothing in the decision in the Gies case nor this decision is to be construed as depriving the courts, in such cases, of jurisdiction or authority to correct such action where or when it occurs in an appropriate proceeding.

The record in this cause indicates that the propriety of the *procedural* steps followed by the County and the trustees is not in issue, and appellant's objections to the order below in other respects are without merit.

Affirmed.

DREW, C. J., THORNAL, O'CONNELL and CALDWELL, J. J., concur

2. Order of Supreme Court of Florida denying Petition for Rehearing:

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1964,
Thursday, February 13, 1964.

THE CORTEZ COMPANY,
Appellant

- vs -

COUNTY OF MANATEE, et al.,
Appellees

On consideration of the Petition for Rehearing filed by Attorney for Appellant,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST:

GUYTE P. McCORD
CLERK SUPREME COURT

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT OF MANATEE COUNTY)

3. UNITED STATES CONSTITUTION, ARTICLE 1, SECTION 10, CLAUSE 1.

"No State shall . . . pass any . . . law impairing the obligation of contracts . . ."

4. UNITED STATES CONSTITUTION, AMENDMENT 14.

> "No person shall be . . . deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation."

5. SECTION 253.15, FLORIDA STATUTES, 1955.

> "In case any island or submerged lands are sold, purchasers shall have the right to bulkhead and fill in same . . ."

6. SECTION 253.12, FLORID ASTATUTES, 1957.

> ". . . navigable waters . . . shall include all coastal and intercoastal waters, of the state . . ."

7. SECTION 253.122, FLORIDA STATUTES, 1957.

> Subject to the formal approval of the trustees of the Internal Improvement Trust Fund, the Board of County Commissioners of each county . . . are hereby authorized on their own initiative to locate and fix a bulkhead line or lines offshore from any existing lands or islands bordering on or being in the navigable water of the county as defined in Section 253-12 . . . Any bulkhead line when so fixed or ascertained and established shall represent the line beyond which a further extension creating or filling of land or islands outward into the waters of the county shall be deemed an interference with the servitude in favor of commerce and navigation with which the navigable waters of this state are inalienably impressed."